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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAMES EARL HUTCHISON, Appellant.	2 CA-CR 2008-0213 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20073523

Honorable Richard D. Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant James Hutchison was convicted and sentenced to a presumptive, six-year prison term for attempted aggravated assault; a consecutive, presumptive, 2.25-year term for disorderly conduct; and a concurrent, presumptive, 7.5-year term for aggravated assault. He argues on appeal the state did not present sufficient evidence he had committed assault and an insufficient number of jurors deliberated on his case. For the following reasons, we affirm his convictions and sentences.

SUFFICIENCY OF EVIDENCE

¶2 We view the evidence in the light most favorable light to sustaining the convictions. *State v. Flythe*, 219 Ariz. 117, ¶ 2, 193 P.3d 811, 813 (App. 2008). On September 6, 2007, Grant N. was at work looking out a window facing the parking lot where his truck was parked about ten feet away. He saw a man, whom he later identified as Hutchison, squat down near his truck, look at it, then take something out of his pocket and enter the truck on the unlocked driver's side. Grant stood up, announced to his coworkers that someone was trying to steal his truck, and left the building to approach Hutchison. Grant yelled, "What do you think you're doing?" and Hutchison got out of the truck and walked behind it, away from Grant, who was trying to catch up with him. Hutchison then started running. Grant pursued him, yelling that he was going to hurt Hutchison. Hutchison then removed a firearm from his backpack and fired it at Grant. Grant believed it was a cap gun and continued to chase Hutchison, who fired the gun a second time.

¶3 At that point Juan T., who was engaged in a conversation on his cellular telephone, saw a man, later identified as Hutchison, coming toward him. He assumed Hutchison had been responsible for the gunshots he had heard because Hutchison had a gun. Juan told Hutchison to "keep going" to clarify that he would not obstruct Hutchison's flight. As Hutchison passed, he pointed the gun at Juan's head. At trial, in response to the prosecutor's question, "[W]ere you scared?" Juan replied, "Well, after hearing the shots, I thought he was just going to pass. At the moment that he pointed the gun to my head, then I thought that it may have not been a good idea to stay there, yeah." After Hutchison passed, Juan did not look back at him. As Juan testified at trial, his actions were designed "[j]ust to give the impression that I was not doing anything regarding him." He then saw police arriving and went to speak to them.

¶4 Officers apprehended Hutchison shortly thereafter and found a loaded handgun in his pocket. Grant, Juan, and another witness identified Hutchison as the shooter. A Pima County grand jury charged Hutchison by indictment with three counts of aggravated assault with a deadly weapon by placing another person in reasonable apprehension of imminent physical harm. Because the trial court found that the state had presented insufficient evidence Grant had been afraid, the court granted Hutchison's motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., as to the aggravated assault of Grant, but found sufficient evidence of the lesser-included attempted aggravated assault charge. The jury found Hutchison guilty of the aggravated assault of Juan, the attempted aggravated

assault of Grant, and the lesser-included offense of disorderly conduct on the aggravated assault charge as to the third victim. After being sentenced by the trial court, Hutchison filed this timely appeal.

¶5 Hutchison argues the trial court erred when it denied his motion for judgment of acquittal on the aggravated assault of Juan. Specifically, he contends the state did not present sufficient evidence that he had placed Juan in reasonable apprehension of physical harm. We review the trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d 159, 161 (App. 2005). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (sufficiency of evidence inquiry "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

¶6 A person can commit aggravated assault by using a deadly weapon or dangerous instrument to intentionally place someone else "in reasonable apprehension of imminent physical injury." A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2).[1] The assault statute "applies a subjective standard to the element of the victim's reasonable apprehension." *State*

[1]At the time Hutchison committed the offenses, the version of § 13-1204(A)(2) in effect was the same in relevant part and can be found at 2005 Ariz. Sess. Laws, ch. 166, § 3.

v. Angle, 149 Ariz. 499, 504, 720 P.2d 100, 105 (App. 1985), *vacated in part on other grounds*, 149 Ariz. 478, 720 P.2d 79 (1986). However, the state need not present testimony from the victim that he or she was actually afraid; rather, the element can be established by circumstantial evidence. *Id.*; *accord State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994).

¶7 Here, the jury received ample circumstantial evidence that Hutchison had placed Juan in reasonable apprehension of imminent harm. Hutchison relies heavily on Juan's testimony that he "finish[ed] his phone conversation" before contacting police to demonstrate Juan had not been afraid. But, Juan also testified that, as Hutchison was coming toward him in the parking lot, Juan believed Hutchison had been responsible for the gunshots and that he probably had a gun. Juan further testified he told Hutchison to keep going in order to assure him that he would not try to stop him. And when asked if he was scared, Juan testified that at the moment the gun was pointed to his head, "[T]hen I thought that it may have not been a good idea to stay there, yeah." Because the jury could have rationally inferred that Juan's initial efforts to avoid conflict with Hutchison were motivated by fear of Hutchison's weapon, and because Juan's testimony itself suggests he became afraid when Hutchison pointed the gun at his head, the court did not err when it denied Hutchison's Rule 20 motion. *See State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) ("[I]f reasonable minds can differ on inferences to be drawn [from the evidence], the case must be submitted to the jury."); *cf. State v. Baldenegro*, 188 Ariz. 10, 13-14, 932 P.2d 275, 278-79

(App. 1996) (mere presence in car at which someone fired shots insufficient evidence of apprehension when no evidence victim saw gun or reacted to shooting).

RIGHT TO TWELVE JURORS

¶8 Hutchison next argues his constitutional right to have twelve jurors decide his case was violated when only eleven jurors responded to the poll at the end of trial. He concedes he did not raise the issue below, and thus, we review it only for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). The Arizona Constitution provides that "[t]he right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons." Ariz. Const. art. II, § 23; *accord* A.R.S. § 21-102(A).

¶9 The state does not dispute that Hutchison was entitled to a twelve-person jury given the nature and number of the charges, but contends twelve jurors were present and polled after the verdict. It relies on the corrected trial transcript filed by the court reporter after the submission of the opening brief and ordered part of the record by this court. But Hutchison contends even the transcript as corrected supports his interpretation of the polling—that only eleven jurors were polled.

¶10 However, both the corrected and uncorrected versions of the transcript show twelve responses to the court's poll. And other than speculating that one juror responded twice to the court's poll based on a potential ambiguity in the transcript, Hutchison has not

shown that only eleven jurors rendered his verdict.[2] The record shows the court empaneled thirteen jurors and chose an alternate before deliberations. The jury deliberated for about one hour. When the jury returned from deliberations, the court stated it would renumber them one through twelve and then read the verdicts. The court then asked, "Ladies and gentlemen, are these your verdicts and the verdicts of each of you?" At the request of defense counsel, the court then polled the jurors individually.

¶11 Thus, in the context of this record as a whole, the arguably ambiguous transcript of the jury polling is insufficient to sustain Hutchison's burden of showing

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[2]The relevant portion of the transcript (as corrected) is as follows:

> THE COURT: Juror Number 9, are they your verdicts?
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> THE JUROR: I'm 10, yes.
>
> THE COURT: Ten renumbered, are they your verdicts?
>
> THE JUROR: Yes, sir.
>
> THE COURT: Juror Number 11, are they your verdicts?
>
> THE JUROR: Yes.
>
> THE COURT: And Juror Number 12, are they your verdicts?
>
> THE JUROR: Yes.

The uncorrected portion of the transcript referred to "Juror Number 9" as "Juror Number 10." Both versions are potentially unclear because the court refers to one juror as "Ten renumbered" rather than consistently using just numerals.

fundamental error and prejudice. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (defendant has burden of persuasion in fundamental error review); *cf. State v. Greer*, 190 Ariz. 378, 380-81, 948 P.2d 995, 997-98 (App. 1997) (no denial of constitutional right to poll jury when court reporter failed to record individual juror responses to poll because issue not raised below and record otherwise showed all jurors had been present and rendered unanimous verdict).

¶12 Hutchison's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge